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No. 76

In the

Supreme Court of the United States

OCTOBER TERM, 1959

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, the HONORABLE LLOYD SHORETT, Judge; and TAXICAB DRIVERS AND CHAUFFEURS LOCAL UNION No. 465, and GEORGE LANCASTER, its Secretary-Treasurer, *Petitioners*,

vs.

THE STATE OF WASHINGTON on the Relation of Yellow Cab Service, Inc., a corporation, *Respondent*.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF RESPONDENT

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ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF RESPONDENT

The Respondent, Yellow Cab Service, Inc., takes no exception to the matter set forth by Petitioners in those sections of their Brief entitled "Opinions Below" and "Jurisdiction."

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those included in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. Secs. 141-187. Pertinent sections of the Act, including some not set forth in Petitioners' Brief, are reproduced in Appendix A, *infra,* pp. 63-68.

Some light is thrown on the issues of this case by the subsequent enactment of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Congress, 1st Session. The relevant provisions of this statute are reproduced in Appendix B, *infra*, p. 69.

QUESTION PRESENTED

Respondent submits that the question presented is properly to be stated as follows:

Do the courts of the State of Washington have jurisdiction, in the face of a claim that such jurisdiction is lodged exclusively in the National Labor Relations Board, to determine whether a cooperative corporation servicing 118 small separately owned taxicab companies should be granted relief under the law of that state against a strike, and peaceful picketing incident thereto, called by a union representing dispatchers employed by said service company where:

1. Neither the service company, nor any of the taxicab companies it services, conducts business across state lines;
2. The 118 separately owned taxicab companies have an aggregate annual gross business of $1,429,914.02 (or an average of $12,117.92 per company) including more than $156,062.40 received pursuant to franchises granting exclusive rights to pick up passengers at certain railroad, airline and steamship terminals;
3. Only 1/10 of 1% of the combined gross revenues of the 118 separately owned taxicab companies — a mere $1,436.55 per year for all, or an average of $12.17 per company per year — is derived from

the transfer of passengers, traveling on "through" tickets, from railroad terminals to steamship docks; and

4. There is no evidence whatsoever that the strike has burdened or obstructed or tends to burden or obstruct commerce or the free flow of commerce within the purview of the National Labor Relations Act?

The court below answered this question in the affirmative.

STATEMENT OF THE CASE

Much of the statement of the case set forth in the Brief of Petitioners is correct. We believe there are a number of errors and distortions in emphasis, however, particularly with respect to matters which are urged as supporting Petitioners' contention that Respondent dominates the affairs of the 118 separate taxicab companies.

We submit that a fairer and more objective statement of the case is found in the opinion of the Supreme Court of the State of Washington (R. 61-62, 63-64) and suggest that reference be made thereto. In addition, we believe the following specific references to portions of the record bearing on important issues in the case will be of help to the Court. Throughout this brief we have used "Petitioners" and "Respondent" to refer to the real parties in interest, to-wit, Taxicab Drivers and Chauffeurs Local Union No. 465 and George Lancaster, its secretary-treasurer, and Yellow Cab Service, Inc., respectively.

At page 4 of Petitioners' Brief they refer, in the first subheading of their statement of the case, to "The Seattle Yellow Cab Enterprise." This reflects an attitude toward the facts, or an interpretation of the evidence, which runs throughout their statement and underlies their entire argument. Although the phrases "one enterprise" or "one operation" were employed by the trial court, we submit that this is misleading insofar as the use of the word "enterprise" implies a single, unified business entity. On the undisputed facts, this case involves a cooperative operation in which 118 small, separately owned taxicab companies (with a total of 120 cabs) operate under a common color, employ a central dispatching system, enjoy certain franchises held for them by Respondent as an agency created to assist them, and benefit from the accounting, advertising, insurance and other services furnished by Respondent. While the obvious fact that the 118 separate companies have some mutuality of interest may provide the basis for an argument that they should be regarded as a unit for certain purposes, it must never be forgotten that for legal purposes, and most others, they are completely separate and distinct in character. They are licensed separately, taxed separately, and rise or fall separately as far as their economic success is concerned. There is no pooling of the revenues earned by the 118 companies, and half may show substantial profits while the rest suffer serious losses (R. 18, 20, 28-29, 46, 73-76, 80-83, 88-91, 108-109, 128, 151-152, 219). The union seems reluctant to recognize this changing pattern in the taxicab business because it requires

changes on the part of the union as well. Instead it apparently prefers to maintain the illusion that it is dealing with one big employer rather than many small ones, most of whom were once members of the union. So Petitioners speak of "the Yellow Cab enterprise" and of "an integrated taxicab service" in an effort to obscure the diversity in ownership and the broad sharing in control which have replaced an earlier unity in the taxicab business.

At page 9 of Petitioners' Brief it is stated that certain authority conferred on Respondent's personnel manager by the owners of the 118 taxicab companies with respect to employed drivers has been "extensively" exercised and that by reason of assignments made by him, there is "considerable" interchange of employees from cab to cab. While the record shows that the personnel manager exercises such powers — under authority delegated by the owner-drivers, and usually in consultation with them—there is no basis for these quantitative characterizations of his actions (R. 33, 172-174, 177-178; Def's. Ex. 22; R. 101, 107, 256). As to the latter point, in fact, the personnel manager testified that he assigned employees to the various owners "occasionally" (R. 178), and that the one individual shown to have driven a number of cabs was not typical because he was in ill health and couldn't work regularly (R. 182).

In the last paragraph on page 10 Petitioners state that Respondent has a five-man board of directors, three of whom represent the Yellow Cab Company (the old partnership) and two of whom represent the

118 operating companies. This is literally true, but does not represent the full truth. In fact, two of the directors representing the partnership are never in town, so although the partnership could control the service company if necessary to the preservation of their security interests, in practice they do not (R. 42, 105). In fact, it is clear from the whole record that the owner-drivers—through their representatives on the board of directors, through monthly meetings of all owner-drivers, and through an operating committee which can act between meetings—actually control the day-to-day detailed operation of their respective businesses, including the joint activities carried on through Respondent (R. 33, 54-55, 92, 93-95, 97-98, 100, 102-103, 104, 106, 132, 135-136, 139, 143, 162, 173, 184, 186-189, 195, 219-223, 224, 226, 232). It is conceded, of course, that Respondent also encompasses security interests of the partners who formerly owned the cabs, as was noted by the courts below (R. 41, 61). However, this does not touch upon the question of control of day-to-day taxicab operations, nor upon the issue of whether all of these companies should be lumped together as a single entity for purposes of this case.

At page 15, Petitioners say that as a condition to agreeing to a new labor contract in the period of negotiations preceding the strike, the union asked the 118 Taxicab companies *and* Respondent to settle several pending grievances which had arisen under the prior contract. Again, this is true, but not the whole truth, because these grievances were directed toward the operating companies and involved their employed drivers

—none of them concerned Respondent or its dispatcher employees, as the trial judge noted (R. 165, 167-168). And Petitioners neglect to state that Respondent, as well as some 19 of the operating companies, have signed the form of contract tendered to them by the union (R. 35, 126, 155, 211; Def's. Ex. 29, R. 126; Def's. Ex. 39, R. 155, 260-278). However, the union returned the signed contract and stated that it would not sign with only part of the Yellow Cab Companies (R. 127; Def's. Ex. 40, R. 156, 157-158, 278-279). The union has consistently refused to recognize the right of certain of the owner-drivers, who are self-employed businessmen, to "single-shift" — that is, to operate their cabs for only the one shift which they drive themselves. Instead, it insists that a driver must be employed for one shift every day a cab is operated. Although this does not affect Respondent, which hires no drivers, and although it and 19 of the operating companies agreed to the contract including this provision, the union refuses to terminate its picketing as to these separate companies unless and until all sign, including those who find it more advantageous not to employ drivers (R. 35, 163-164, 167-169; Def's. Ex. 39, R. 155, 260-278). As is argued below, this is contrary to the public policy of the State of Washington.

At page 17 of their brief, Petitioners state that contemporaneously with the filing of Respondent's complaint, the latter obtained an order requiring Petitioners to appear and show cause why a temporary injunction should not issue pending a trial on the merits of the request for a permanent injunction. This is not ac-

curate—the order required Petitioners to show cause why a *permanent* injunction should not issue (R. 6). This is important, because the result was that, in sharp distinction from many similar cases, no *ex parte* or temporary relief was obtained. As a consequence, no judicial order has ever been entered which in any way restricted the union's freedom to picket. There is therefore no need to speculate as to the impact of this labor dispute upon interstate commerce. The picketing was in its twenty-fourth day when the proceedings in the trial court came to an end. If the strike and the concomitant picketing had any effect upon interstate commerce, the burden was upon Petitioners, who had asserted the exclusive jurisdiction of the National Labor Relations Board, to prove this essential condition to federal power in this field. *There is not a shred of evidence in the record that this labor dispute has burdened or obstructed or has tended to burden or obstruct commerce* (R. 66; Pet. Brief, p. 39). In fact, the only picketing shown in the record has been confined to the location of the garage occupied by Respondent (R. 11; Pet. Brief, p. 16) and has not involved any of the air, rail or ship terminals serving interstate transportation agencies. The taxicabs continue to operate, being driven by their owner-drivers (R. 128, 214-215, 228-229). Similarly, there is no evidence of any purchase by Respondent, or the 118 taxicab companies, of products moving in interstate commerce, or the extent to which, if at all, such purchases have been affected by the strike.

It must be kept in mind that neither of the courts

below found or concluded that Respondent and the 118 taxicab companies were anything other than *bona fide* separate legal entities. The trial court concluded, after Petitioners had cited cases of the kind set forth in the footnote on page 26 of their Brief in this Court, that Respondent acts for the 118 companies as their *alter ego*, and that their business ought to be considered as one enterprise or one operation. It should be noted that another Superior Court judge had reached just the opposite conclusion in a lawsuit some six months earlier between most of the 118 taxicab companies and Petitioners herein (Pl's. Ex. 49, R. 239). And the record is clear that the 118 corporations are separately owned and controlled, having no officers or directors in common (except for a few instances where one man owns two or more companies); that Respondent owns no interest in any of the 118 separate companies; that none of the partners of the Yellow Cab Company owns any interest in the 118 corporations nor serves as officer or director therein (R. 32, 46, 61, 123-124, 128-129, 164, 223-225). The Supreme Court of the State of Washington did not pass on this issue, but simply stated that for the consideration of the issue of jurisdiction it had accepted the union's "hypothesis" that Respondent and the 118 operating companies constitute a system that can be treated as an entity (R. 67).

Another significant factor to be kept in mind is that Respondent itself has never been engaged in the operation of taxicabs—and in fact has never owned a cab or employed a driver. Instead, it provides certain services which meet the joint needs of the 118 operating com-

panies, including telephone answering and radio dispatching, accounting, sale of advertising, and assistance in placing insurance. Its revenues—which amounted to $162,988.80 for the period July 1, 1957 through June 30, 1958—come to it not directly from the cab-using public, but are paid over to it by the operating cab companies for the services rendered. Those services are completely local in character and the company's revenues fall below the minimum monetary jurisdictional standards set by the National Labor Relations Board (R. 29, 31, 46, 108-109; Def's. Ex. 24, R. 108, 258; Pet. Brief, pp. 47-48).

There has been no history of joint bargaining through an agent, committee, or association authorized to speak for Respondent and the 118 companies. In 1956 representatives of Respondent and a committee of approximately 25 owner-drivers met with the union to negotiate terms of a proposed agreement, which was then submitted to, and signed by, each of the 118 companies and Respondent separately, each acting with respect to its own employee or employees. Again in 1958, representatives of Respondent and a committee of five owner-drivers negotiated with the union, but with the clear understanding that they could only submit any resulting agreement to the separate companies for individual signature. As is indicated above, Respondent and 19 taxicab companies have signed the proposed agreement (R. 34-35, 47, 55-56, 123-124, 126, 223-225; Pl's. Ex. 29, Def's. Ex. 38, 39, R. 126-127, 155-157, 260-278).

This proceeding was instituted by Respondent in its individual behalf rather than as a representative of the 118 operating companies. It was brought to challenge actions of Petitioners which had deprived Respondent of the services of its ten dispatchers and on allegations that Respondent either had a contract with the union, or was willing to sign one, so that no labor dispute existed between it and the union (R. 1-5, 30). Petitioners seek not only to lump together the revenues of the 118 taxicab companies for jurisdictional purposes but also to combine the separate labor disputes which exist between some of them and the union. It should not be forgotten that the real question here is as to jurisdiction over a labor dispute involving a local service organization with ten striking employees and earning revenues of less than $175,000.00.

SUMMARY OF ARGUMENT

Petitioners have challenged the jurisdiction of the state courts over this proceeding, their position having been accepted by the trial court but rejected by the court below. Their contention being that the National Labor Relations Board has exclusive jurisdiction of the dispute here in question, they must establish (1) that the strike and picketing substantially affect commerce and (2) that the picketing sought to be enjoined is either proscribed or protected under the National Labor Relations Act. They have failed to do this.

The power of Congress in the area of labor relations rests upon the Commerce Clause, which has had a long and varied interpretative history. In recent years the

pendulum has swung a long way in the direction of expanding the power of the federal goyernment in the field of business regulation at the expense of the authority of the States. However, ours is still a federal system requiring a careful and perceptive balancing of national and local interests and powers. *Kelly v. Washington* (1937) 302 U.S. 1, 82 L.Ed. 3; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board* (1949) 336 U.S. 301, 93 L.Ed. 691.

Even when Congress acts in a particular field, it is possible that it will not exercise its power to its constitutional limits. While it is conceded that in the National Labor Relations Act Congress has made the legislation coextensive with its power over commerce, nonetheless this Court has held that Congress has dealt only partially with the employer-employee relationship, leaving closely related matters outside the scope of the authority delegated to the National Labor Relations Board and thus subject to regulation by the States. *Bethlehem Steel Co. v. New York State Labor Relations Board* (1947) 330 U.S. 767, 91 L.Ed. 1234; *International Union, UAW v. Wisconsin Employment Relations Board* (1949) 336 U.S. 245, 93 L.Ed. 651; *Weber v. Anheuser-Busch* (1955) 348 U.S. 468, 99 L.Ed. 546. It is our contention that the conduct of the union complained of here falls within this category as matter neither proscribed nor protected by the federal legislation.

Although neither Respondent nor the 118 taxicab companies are directly engaged in interstate commerce, since it is admitted that none of their operations

cross state boundaries, it is true that a very small fraction of the business of the operating companies constitutes a link in such commerce. This involves the transfer, between railway terminals and steamship docks, of passengers traveling on through tickets, which produced revenues of $1,436.55 in the period July 1, 1957, through June 30, 1958—just 1 10th of 1% of the aggregate gross revenues of the 118 companies and an average of $12.17 per company. Even if this is a relevant test in this proceeding involving the labor relations of Respondent alone, so insignificant an item should be dismissed as *de minimis*. *Friedberg v. Pennsylvania Labor Relations Board*, 395 Pa. 294 (Advanced Sheets) 148 A.(2d) 909, certiorari denied 28 Law Week 3107. It fails to meet the National Labor Relations Board's own jurisdictional standard for linkage activities, which specifies a minimum of $50,000.00. NLRB Press Release R-576, Oct. 2, 1958. Congress has recently provided that the Board can, by such action, decline to assert jurisdiction where, in its opinion, the effect of a labor dispute on commerce is not sufficiently substantial to warrant exercise of its authority, and has further provided that state courts may exercise jurisdiction over such disputes. Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Congress, 1st Session.

The remainder of the revenues of the 118 operating companies—if that is to be the test—are not derived "in commerce", and could be said, at most, to involve activities "affecting commerce." Petitioners argue, therefore, that federal jurisdiction can be sustained on

this latter ground. This contention must fall, however, because there is no evidence in the record to show that the conduct here in question—the picketing of Respondent's garage—has had any impact whatsoever on the interstate movement of passengers. Failure of proof on this point leaves no basis for a claim of exclusive federal jurisdiction, since the courts of the States are not to be denied power to hear and decide disputes otherwise within their competence merely on the basis of the sort of conjecture and inference contained in the Briefs of Petitioners and of counsel for the National Labor Relations Board.

Further grounds for the conclusion that exclusive jurisdiction over this matter is not lodged in the National Labor Relations Board are provided by the fact that the union's conduct involved here is neither an unfair labor practice specified in Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158) nor a form of concerted action protected by Sections 7 or 13 of the Act (29 U.S.C. Sections 157, 163). Respondent's complaint is that the union, by its strike and the picketing incidental thereto, is inflicting injury on Respondent—though the latter has signed the contract tendered by the union and there is therefore no labor dispute between them—in order to induce Respondent to compel all of the 118 operating companies to sign the agreement as well. This is claimed to be unlawful coercive action under State law, but does not fall within the carefully drawn specifications of refusal to bargain collectively or of a secondary boycott (29 U.S.C. Sections 158(b)(3) and (4)). As a consequence, even

though the picketing in this case was peaceful, it cannot be claimed to be entitled to the protection of the federal act. *International Brotherhood v. Hanke* (1950) 339 U.S. 470, 94 L.Ed. 995.

In view of all this, it was entirely proper for the State courts to accept this case for the purpose of determining whether it falls within their jurisdiction. The argument that they should have refused to entertain the matter at all upon the mere invocation of the jurisdiction of the National Labor Relations Board would deny them their inherent power to determine their own jurisdiction—and would, in this and many similar fields, reduce them to the status of inferior appendages to federal administrative tribunals. The Supreme Court of the State of Washington having unanimously held that jurisdiction lies in the State courts, its determination should be confirmed for the reasons summarized above.

ARGUMENT

Respondent brought this action in the state courts rather than before the National Labor Relations Board because it was convinced that this procedure was the proper one. It reached this conclusion not out of any desire to avoid the Board but because of a conviction that the latter did not have jurisdiction of the labor dispute in question and could not grant the relief sought against Petitioners. The latter challenged the trial court's jurisdiction, and in so doing assumed the burden of proving every fact necessary to establish the jurisdiction of the Board, which they contended was

exclusive. They persuaded the trial judge on this issue, but the Supreme Court of the State of Washington ruled adversely to their claim, finding that they had failed to meet this burden.

I. The Interpretation of the Commerce Clause Has Gone Through a Number of Significant Cycles Throughout Our History But There Is Still Urgent Need for a Sensible and Viable Balance Between Federal and State Authority If Our Federal System Is to Thrive

In our answer to Petitioners' application for writ of certiorari, we urged that the case was not sufficiently important to require review by this Court because it seemed to us that here, as in no other case heretofore presented to the Court, the doctrine of *de minimis* should certainly apply. In view of the undisputed evidence that neither the cab companies nor the Respondent are engaged in interstate commerce and that only 1/10th of 1% of the total combined gross revenues of the 118 taxicab companies, a mere annual revenue of $1,436.55, is obtained from taxicab business in the flow of interstate passenger travel, it seemed to us to be incredible to assert that the NLRB has exclusive jurisdiction of such a small local enterprise, where 99-9 10% of its business was in intrastate commerce and there was no evidence that the strike and picketing have affected interstate commerce in any way.

The granting of the writ, however, compels us to stress the grave constitutional question which would be presented if this Court were to reverse the unanimous decision of the Supreme Court of the State of Washington and deprive the courts of that State of

any jurisdiction in a labor dispute affecting such wholly intrastate activities.

No precise formulae have been announced by this Court in marking out the boundary between federal and state jurisdictions over commerce. There have, of course, been periods during the life of the Court when the Commerce Clause has been strictly construed, and others, particularly in more recent times, when this clause has been very liberally interpreted in favor of federal jurisdiction. It is understandable why this Court, in modern times, has construed the Commerce Clause to grant to the federal government exclusive jurisdiction as to instrumentalities and fields of interstate commerce which were not known at the time the Constitution was adopted. This is natural and proper, because the Constitution obviously must be construed in the light of conditions now existing and which presumably the founding fathers would regard as within their purpose if they were living today.

On the other hand, despite the extent to which some recent decisions of this Court have gone in expanding federal jurisdiction under the Commerce Clause, it has never been supposed that there does not still remain an area of local commerce beyond the reach of federal agencies and entrusted to the authority of the States. We believe it can be asserted, however, that if this case is reversed, then there will no longer be any balance between federal and state jurisdiction, particularly in the field of labor relations. Instead, state jurisdiction even over purely intrastate commerce will

be obliterated—except possibly for some odds and ends left to the States because the National Labor Relations Board does not choose to be bothered with them.

This is a matter of grave concern to all who cherish our federal system of government, for such a delicately balanced relationship between governments exercising authority in the same territorial area cannot survive if the power of one is thus dependent upon the changing whims of an administrative agency created by the other. The question is not the extent to which Congress has exercised its powers in various enactments in different fields. It is, rather, whether Congress has the right to exercise power over labor disputes affecting purely local businesses and their entirely intrastate transactions to the extent that counsel for the National Labor Relations Board contend in their *amicus* brief in this case.

We would like to discuss some of the major shifts in the judicial pronouncements in this area of constitutional law during the last century and a half. We do not contend that any of the earlier decisions are decisive today, but believe that a reading of them places the constitutional issue in better historical perspective. As a result, this portion of the argument is somewhat longer than otherwise would be the case, and in contrast to the treatment of the issue by Petitioners in their Argument.

It will be recalled that prior to the case of *Gibbons v. Ogden*, 9 Wheat. 1, decided in 1824, the Commerce Clause was construed very narrowly. The term "com

merce," from which the English word "commerce" was derived, was construed to be confined to traffic in goods or merchandise. In his famous opinion in this case, Chief Justice Marshall held that this construction was too restrictive, and that the word included all types of commercial (although not nonprofit) traffic between states, including, in particular, navigation of passenger vessels, which was the subject matter of that case.

In a series of cases commencing with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, decided in 1856, this Court greatly broadened the definition of commerce to extend to every type of movement of persons and things, whether for profit or not, and succeeding cases in this line expanded the interpretation of the word to include every kind of commerce, every type of transmission of intelligence, and every species of commercial transaction which sooner or later involved an act of transportation of persons or things or the flow of services across state lines.

In most of the early cases construing the Commerce Clause, it was interpreted primarily as a limitation on the powers of the States. However, the Court has also been called upon, from time to time, to interpret the Commerce Clause as a source of national power and has had recourse, in that connection, to the "necessary and proper clause" of the Constitution.

Before discussing cases which are of primary concern to us because they involve the Taft-Hartley Act and the National Labor Relations Board directly, it

may be well to consider some of the landmark cases under other acts, particularly in the field of antitrust law.

The leading case in this area is the famous "Sugar Trust Case," *United States v. E. C. Knight Co.* (1895) 156 U.S. 1. Here the government asked for the cancellation of certain agreements whereby, through purchases of stock in other companies, the American Sugar Refining Co. had acquired nearly complete control of the manufacture of refined sugar in the United States. Chief Justice Fuller's opinion sets forth the conception of the federal system that controlled the decision:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The doctrine of this case has, of course, been long since overruled. There then developed the new "current of commerce" doctrine, which was enunciated by Justice Holmes in *Swift & Co. v. United States* (1905) 196 U.S. 375, 396. In this opinion, Justice Holmes stated:

> "... commerce among the states is not a technical

legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

Let us now turn to a series of important decisions of this Court involving the jurisdiction of the federal government under acts of Congress enacted to counter the depression of the 1930's. One of the most important of these is the famous case of *Schechter Corp. v. United States* (1935) 295 U.S. 495, 79 L.Ed. 1570. This involved constitutionality of the National Industrial Recovery Act and turned on the question whether poultry imported into New York and thereafter processed was still in the current of interstate commerce when the intrastate processing commenced. The Court in effect held that when the poultry arrived at its destination at the Schechter plant in New York, interstate movement had finished and the federal government thereafter had no control over the processing of the poultry. It should be remembered that this was a decision written less than twenty-five years ago by Chief Justice Hughes. The following portion of the opinion is important in connection with this case:

"In determining how far the Federal Government may go in controlling intrastate transactions

upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * * But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. * * * "

May we say parenthetically that we gladly concede the necessity for a strong central government and the overriding need for it to possess sufficient authority to deal with problems beyond the abilities of the States to cope with or vital to over-all national policy. But in purely local matters it cannot be arbitrarily assumed that the national government has a monopoly of competence, and on the contrary it seems clear that it will often be far less concerned with the settlement of purely local problems than the States themselves.

At a subsequent point in his opinion, Justice Hughes stated, in referring to certain previous decisions of the Court:

" * * * While these decisions related to the application of the Federal statute, and not to its con-

stitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal power, and for all practical purposes we should have a completely centralized government."

Similar expressions are found in *United States v. Butler* (1936) 297 U.S. 1, 80 L.Ed. 477, in which the Court invalidated the Agricultural Adjustment Act of 1933, and *Carter v. Carter Coal Co.* (1936) 298 U.S. 238, 80 L.Ed. 1160, in which the Bituminous Coal Conservation Act of 1935 was held unconstitutional. These three cases represent a marked swing in the direction of a strict construction of the powers of Congress under the Commerce Clause and in favor of the recognition of States' rights. However, in a series of subsequent cases the Court has in effect reversed itself, departed from the distinction between direct and indirect effects upon interstate commerce, and returned to the more liberal "current of commerce" doctrine announced in the *Swift* case.

The first of these later cases was that of *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 81 L.Ed. 893, concerning the National Labor Relations Act of 1935. We have no quarrel with this case, which is certainly distinguishable on its facts because of the vast industrial empire there involved, which spanned state boundaries and involved substantial movements of goods in interstate commerce. Also of significance in this line of cases were

United States v. Darby (1941) 312 U.S. 100, 85 L.Ed. 609, sustaining the validity of the Fair Labor Standards Act of 1938, as well as *United States v. Wrightwood Dairy Co.* (1942) 315 U.S. 110, 86 L.Ed. 726; and *Wickard v. Filburn* (1942) 317 U.S. 111, 87 L.Ed. 122.

Another early case of importance in the labor relations field was that of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938) 303 U.S. 453, 82 L.Ed. 954. The packing company was engaged in canning, packing and shipping fruits and vegetables, the bulk of which were grown in the State of California. In the year 1935 it had packed about 1,700,000 cases, of which some 37% were shipped in interstate or foreign commerce, although all sales to purchasers outside of the state were made either f.o.b. or c.i.f. San Francisco Bay Area points. Chief Justice Hughes stated the issue and the applicable law as follows:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546, 79 L.Ed. 1570, 1588, 55 S.Ct. 837, 97 A.L.R. 947. 'Activities

local in their immediacy do not become interstate and national because of distant repercussions.' *Id.*, p. 554.

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close' and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

* * *

"'The critical words of the provisions of the National Labor Relations Act in dealing with the described labor practices are 'affecting commerce,' as defined (§ 2(6)). It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent, and not to more than 50 per cent, of its production cannot be deemed controlling. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

The *Santa Cruz* case is clearly distinguishable from

this one, first on the ground that 37% of the total production of the packing company there moved *directly* in interstate commerce, whereas here only 1/10th of 1% affects such commerce, and secondly, it remains true, as stated by Chief Justice Hughes, that the unfair labor practices involved must have "a close and substantial relation to the freedom of interstate commerce from injurious restraint."

The cases of *National Labor Relations Board v. Fainblatt* (1939) 306 U.S. 601, 83 L.Ed. 1014, and *National Labor Relations Board v. Bradford Dyeing Assoc.* (1940) 310 U.S. 318, 84 L.Ed. 1226, cited by Petitioners, are important landmarks in labor relations law but are not applicable here. They are clearly distinguishable because they concerned manufacturing plants whose raw materials and finished products moved in interstate commerce and involved a much greater volume than is here presented, and because in the former case clear evidence was offered of actual impact upon such commerce, while the latter case involved purely preventive action by the Board in advance of any work stoppage.

One of the most recent cases dealing with the jurisdiction of the National Labor Relations Board is that of *San Diego Building Trades Council v. Garmon*, — U.S. —, 3 L.Ed.(2d) 775, decided on April 20, 1959. This case seems to go farther than any other in extending the doctrine of exclusive federal jurisdiction in this field, and in our view poses a real threat of virtual elimination of the balance between federal and states rights so eloquently defended in Chief Justice

Hughes' opinion in the *Santa Cruz* case. But even despite the extent to which the *Garmon* case goes in further limiting the jurisdiction of state courts, it is nonetheless clearly not controlling here because in that case the employer partnership, in operating its retail lumberyards, had purchased in the preceding year more than $250,000 worth of materials from outside of California for resale within that state, thereby directly involving itself in interstate commerce. Furthermore, the partnership specifically alleged that it was engaged in interstate commerce, and the question of the possible application of the doctrine *de minimis* was not even raised, probably because in previous decisions of this Court and lower federal courts smaller amounts, both in terms of volume and of percentage, had been held not to be *de minims*. There is no comparison, however, between the $250,000 worth of business involved in the *Garmon* case, on the one hand, and the $1,500 earned by the 118 cab companies from their linkage function in interstate commerce in the instant case.

We believe that Justice Harlan, in his concurring opinion in the *Garmon* case, spoke with prophetic accuracy when he said:

> "Should what the Court now intimates ever come to pass, then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point."

We are confident that the Court intends no such drastic departure from past constitutional practice, and are convinced that Congress cannot constitutionally be given such all-encompassing power in the labor field.

The one common thread running through all the cases cited above, including those recognizing broad federal power over commerce, is a real and continuing concern for the preservation of our federal system on a strong and vital basis. This is certainly as important today as ever before in our history.

Difficult though the task may be, a line must be drawn somewhere between the respective powers of the federal government and of the States in the labor field. As Chief Justice Hughes stated in the *Santa Cruz* case, *supra*:

> "The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have *such a close and substantial relation to the freedom of interstate commerce from injurious restraint* that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes." (Emphasis supplied)

To assert that $12 of business per year for a single taxicab company, or $1,500 per year collectively for 118 such companies joined in a cooperative operating system, has or might have a substantial effect upon the flow of interstate commerce is so ludicrous as to warrant no serious consideration. This is particularly true in view of the complete absence of any evidence either (1) that picketing was carried on at any of the transportation terminals affecting interstate commerce, or (2) that such picketing as was done in fact resulted in any obstruction of interstate commerce. This is why

the court below properly held that interstate commerce had not been affected to any appreciable extent and that the National Labor Relations Board therefore did not have exclusive jurisdiction in this case.

As is discussed in later portions of this Brief, Petitioners suggest that undoubtedly the taxicab companies make direct or indirect out-of-state purchases of taxicabs, parts, gasoline, etc. There is, of course, no evidence as to this in the record. But if exclusive federal jurisdiction is to be sustained upon the ground of direct or indirect out-of-state purchases for a wholly intrastate enterprise, then what is left to the states under the reserved powers of the Tenth Amendment? What of the corner drug store? In most instances, probably 90% of its drugs are bought directly from sources outside the state. What about the small shoe repair shop? In most states, the leather it uses is undoubtedly brought in from other states. And what of the local photographer, the local hotel or motel, the local barber shop, the local grocery cooperative, and the many other local businesses which are the backbone of our economy? If they become involved in labor disputes, the effect, if any, upon interstate commerce is so slight that it should not be deemed as conferring exclusive jurisdiction on the National Labor Relations Board. The States are quite competent to deal with such localized disputes and are the natural agencies for the disputants to call on for assistance, which can be more simply, more economically, and more promptly given at the local level. The federal government has larger problems, certainly, to engage its energies, including those large scale disputes

which do substantially affect interstate commerce. There is certainly work enough for both elements in our federal system and it can best be handled, in the interests of the public, if a fair and reasonable balance between state and federal authority and responsibility is maintained.

We believe that the decision below properly respects the line between federal and state power in the labor field and that it should not be disturbed upon this review lest all semblance of balance between state and federal jurisdictions be lost, with serious impact upon our basic constitutional system.

II. Congress Has Not Undertaken to Regulate all Labor Relations

We recognize that Congress has undertaken, through the provisions of the National Labor Relations Act, to exercise its authority over commerce extensively with respect to the employer-employee relationship, and has therefore drawn this legislation more broadly than was done in the case of the antitrust laws and the Fair Labor Standards Act. But the fact remains that it has sought to deal only with interstate commerce — and that it can deal with nothing more. No gloss upon the constitutional language can obscure the fact that it necessarily implies that there is a body of commerce which is *not* subject to Congressional regulation.

Conceding that Congress has extended its regulation of commerce in the labor field to the limits of its constitutional power, however, does not mean that all phases of the labor-management relationship have

been covered by the National Labor Relations Act. The fact that Congress has just recently seen fit to legislate further on the subject, together with the well-known belief of some that still further regulation is needed, makes it clear that the Labor-Management Relations Act of 1947 was not a comprehensive labor code. This Court has recognized this in a number of cases—and with it the necessary correlative that certain of these unregulated matters are proper subjects for state action.

In *Bethlehem Steel Co. v. New York State Labor Relations Board* (1947) 330 U.S. 767, 773, 91 L.Ed. 1234, the Court recognized that Congress had only partially occupied this field, saying:

> "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences [to commerce] arise. It has dealt with the subject or relationship but partially, and has left outside the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent. . . . However, the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." (Matter in brackets inserted)

The Court there concluded that the New York Board's recognition of foremen's unions was in conflict with the policy of the NLRB and could not stand. But the courts of Washington can deal with the conduct of

the union in this case without creating any obstacle to the accomplishment of the purposes of Congress."

In *Weber v. Anheuser-Busch* (1955) 348 U.S. 468, 480, 99 L.Ed. 546, the Court said:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters, C. & H. Local Union* (U.S. *supra*. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U.S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation."

See, also, the following cases:

Allen-Bradley Local v. Wisconsin Employment Relations Board (1942) 315 U.S. 740, 86 L.Ed. 1154;

International Union, UAW, v. Wisconsin Labor Relations Board (1949) 336 U.S. 245, 93 L.Ed. 651;

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board (1949) 336 U.S. 301, 93 L.Ed. 691;

United Construction Workers v. Laburnum Construction Corp. (1954) 347 U.S. 656, 98 L.Ed. 1025;

United A.A. & A.I.W. v. Wisconsin Employment Relations Board (1956) 351 U.S. 266, 100 L.Ed. 1162;

International Assoc. of Machinists v. Gonzales (1958) 356 U.S. 617, 2 L.Ed.(2d) 1018;

International Union, U.A., A. & A.I.W. v. Russell (1958) 356 U.S. 634, 2 L.Ed.(2d) 1030.

These cases make it clear that the cry of federal pre-emption is not to be heeded automatically and without critical examination. To the extent that Congress has occupied the labor field it has pre-empted state jurisdiction. But its occupation is only partial, and the same must therefore be true as to the resulting exclusion of state power. It is therefore necessary to see whether Congress has in fact dealt with conduct of the kind here involved and provided a remedy therefor, so as to provide a basis for the contention of Petitioners that it has pre-empted jurisdiction thereover to the exclusion of the States. This requires consideration of the essential bases for the jurisdiction of the National Labor Relations Board which is set up as a bar to state action in this case.

III. Jurisdiction of The National Labor Relations Board Depends on the Concurrence of Two Essential Facts: (A) Conduct Which Is Either Proscribed or Protected by the Statute, and (B) Demonstration That This Conduct Affects Interstate Commerce

The National Labor Relations Board is not a court of general jurisdiction but an administrative tribunal established to administer a federal statute. It therefore has only the jurisdiction and authority expressly conferred upon it by Congress within the four corners of that statute, and if it be felt that the scope of such jurisdiction and authority should be extended, that can be accomplished only by Congress through an amendment of the law and not by the Board through a press release or otherwise.

The business of the Board is to prevent certain abuses, termed unfair labor practices, which Congress found to have prevailed in connection with labor disputes affecting commerce, and to protect certain rights of employees which Congress found to have been denied in the past, with adverse effects on such commerce. Any party seeking to invoke the assistance of the Board must allege either that his adversary has committed or threatened an unfair labor practice, or that he himself has been, or is about to be, deprived of rights guaranteed by the Act — and must then go on to prove that interstate or foreign commerce is affected.

A. The Strike and Picketing Here Involved are Neither Proscribed Nor Protected by the Federal Act

Petitioners have satisfied neither of these require-

ments. They made vague assertions in this regard in the state courts, the most specific being a statement in their memorandum filed with the Supreme Court of the State of Washington, as follows:

> "If plaintiff's contentions are true, the union's conduct would constitute a 'refusal to bargain,' or a 'secondary boycott' under the terms of the federal Act, 29 U.S.C. Secs. 158(b)(3) and 158(b)(4)(A).
>
> "If plaintiff's contentions are not true, then the union's conduct would constitute lawful 'concerted activities' which are protected activities under the terms of the federal Act, 29 U.S.C. Secs. 157, 163."

The sections of the statute cited by Petitioners are set forth in Appendix A hereto, p. 67. We submit that it was incumbent upon Petitioners to demonstrate the applicability of one or the other of these sections to the precise facts of this case, since they are the parties asserting the jurisdiction of the National Labor Relations Board. This they have utterly failed to do—for the very good reason, we believe, that it cannot be done.

Let us suppose that Respondent had chosen to complain of the union's action to the Board rather than to the state courts. How could it have brought its case within the very precise language of these statutory provisions? It seems clear to us that it could not properly have pleaded that the union had been guilty of refusing to bargain collectively, and we so advised the trial judge. The scope of the obligation to bargain collectively is fixed by 29 U.S.C. Sec. 158(d), which is also set out in Appendix A hereto. Respondent does not, and cannot,

contend that the union has refused to meet at reasonable times or to confer in good faith with respect to wages, hours, and other terms and conditions of employment. The union has always been willing to meet and negotiate. But Respondent is not now asking the union to bargain further, because the company has already indicated its acquiescence, as to its ten dispatcher employees, to the terms which the union has exacted from others in the cab industry in Seattle. It simply contends that on these facts it has no labor dispute with the union and the latter cannot picket it—a position which has nothing to do with a demand for further collective bargaining.

Similarly, while the union has refused to sign, in its turn, the contract signed by Respondent—and in fact returned the contract to the company—relator cannot honestly claim that this is a "written contract incorporating any agreement reached" within the statutory language making refusal to execute such an agreement a refusal to bargain. The union has always made it perfectly clear that it would not sign this contract with Respondent alone, regardless of the latter's full acceptance of the terms demanded. As a consequence, Respondent cannot fit itself within the statute because there has been no oral meeting of the minds which simply requires reduction to writing. Respondent therefore contends that it is being victimized not by a refusal to bargain, as specified in Sections 158(b)(3) and 158(d), but by an affirmative effort to coerce it to attempt to compel the 118 purchasing corporations to sign the same agreement. We contend this is a wrong

not comprehended in the federal act and for which the state courts should, and would, give redress.

Similarly, if Respondent were to go before the NLRB, it believes it could not, successfully, claim that the union is guilty of a secondary boycott. Though it is clear that the union has induced the employees of Respondent to engage in a strike, the required objective is lacking. Section 158(b)(4)(A), which is the one cited by Petitioners as having possible application, would require Respondent to prove that the union was seeking (1) to force some employer—*i.e.*, one of the owner-drivers—to join some labor or employer organization, or (2) to force some employer or other person to cease using, selling, handling, etc., the products of another or to cease doing business with any other person. Neither of these can be established because (1) the union has made employer membership in the union strictly optional in case an owner-driver desires the benefits of the Union pension fund (R. 208), and no employer organization is involved; and (2) no effort has been made to force Respondent to cease doing business with the purchasing cab companies or vice versa. Indeed, even if Respondent were to cease to do business with a particular purchasing corporation, or in fact with any number of them, this would not satisfy the union and eliminate its pickets. What the union wants Respondent to do is to coerce the purchasing corporations directly in order to make them sign the contract. It insists, in the face of all the evidence, that this whole maze of corporations is a single entity dominated from the top and that Respond-

ent must crack the whip—an instrument which the latter insists it doesn't possess.

Thus, it appears to Respondent that the statutory categories of unfair labor practices to which it is referred by Petitioners simply do not fit its case—nor is it surprising that they do not. These carefully defined practices which the federal act declares to be unfair were the end result of certain common patterns which had developed over the years in the field of labor relations on the national level. But the pattern now developing in the taxicab industry of the sale of centrally owned taxicab fleets to large numbers of owner-drivers is of recent origin, is unique to the taxicab industry, and is not even widely prevalent in this industry itself. It is no wonder, therefore, that it was not anticipated by Congress in 1947 when the Labor Management Relations Act was adopted. Only in the cab industry, so far as we know, is it possible to use two pickets to blockade 119 employing corporations, exerting direct and primary economic pressure against all of them simultaneously.

In other words, as has already been said, the only pressure exerted by the union on Respondent—aside from direct pressure to compel it to pay higher wages, to which it has already assented—is pressure to compel it to coerce, in some undefined way, the signing of the contract by all 118 operating cab companies. Since Respondent does not own these companies and has no contractual right thus to dictate to them, it finds itself in a dilemma. The union states that it will not cease picketing Respondent unless and until it has forced the owner-

operators to sign, but since no means of compelling such action exists, Respondent is faced with indefinite picketing and with the publicizing of the union's "unfair" designation although it has agreed to every demand made by the union with respect to its own employees. Thus Respondent contends that it is the victim of a wrong not contemplated by Congress, not included in the federal act, and therefore not entrusted to the NLRB.

We submit that this being the case, the court below was correct in ruling that the trial court should take jurisdiction of the matter to determine whether the law of the State of Washington provides Respondent a remedy against the action complained of.[1] This Court stated in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board* (1949) 336 U.S. 301, at 305, 93 L.Ed. 691, that:

> "The States are free (apart from preemption by Congress) to characterize any wrong of any kind by an employer to an employee (and certainly a

[1] It would not be proper, of course, to argue the merits of that issue here. However, it may be appropriate to suggest that the State of Washington has a public policy against the coercive use of picketing which this Court has approved, in two different contexts, in *International Brotherhood v. Hanke* (1950) 339 U.S. 470, 94 L.Ed. 995, and *Building Service Employees International Union v. Gazzam* (1950) 339 U.S. 532, 94 L.Ed. 1045. In essence, the union here seeks to force Respondent to compel the some 20 to 30 owner-drivers who prefer to "single-shift" their cabs to enter into the contract with the union in violation of the policy recognized in the *Hanke* case. In each of these cases the picketing enjoined was peaceful. Similarly, the State has a public policy against picketing where there is no labor dispute. *Morris v. Local Union No. 494* (1951) 39 Wn.(2d) 33, 234 P.(2d) 543, and cases there cited. It should also be noted that Respondent contended below that the picketing was deceptive in that it charged all Yellow cabs with being unfair when 19 of the operating companies, had, like Respondent, signed the contract proffered by the union.

> wrong by a union to an employer as well], whether statutorily created or known to the common law, as an 'unfair labor practice'." (material in bracket inserted).

We submit that since the coercive conduct here involved is not prohibited by the federal act, there has been no pre-emption of state power to deal with it. See also *International Union, U.A.W. v. Wisconsin Employment Relations Board* (1949) 336 U.S. 245, at 254, 93 L.Ed. 651. The union's conduct here is entirely ungoverned unless governable by the State of Washington.

If this conduct is not prohibited by the federal statute, then the National Labor Relations Board does not have jurisdiction. If that is the case, the state courts may take cognizance of the complaint and determine whether the acts of the union violate state law. If they find such a violation, it must follow that the picketing is not privileged, even though peaceful, because there is nothing in 29 U.S.C. Secs. 157 and 163 which sanctions strikes or other concerted action when they are designed to achieve improper coercive results or are carried on to the injury of a party with whom the union has no existing labor dispute. These provisions are intended, rather, to protect employees in the exercise of their concerted economic power in aid of the traditional objectives of better wages, hours and working conditions. Certainly a party having a complaint against a union for which the NLRB can grant no relief would not be required to institute a proceeding before the Board to determine that the conduct complained of is not protected concerted

action as a pre-condition to seeking relief in a state court.[2] On the other hand, if the picketing is defended as an exercise of the right of free speech, this contention can be asserted in the state courts as well as before the NLRB, with ultimate review in this Court to insure protection of any claimed right under the First Amendment to the United States Constitution.[3]

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[2] At page 31 of Petitioners' Brief they argue that if the NLRB's jurisdictional standards are to be challenged, this should be done in a proceeding before the Board and not in state court. This would deny to the courts of the States the right to determine their own jurisdiction, when it has been duly invoked, merely because the defendant alleges that some federal administrative agency has exclusive jurisdiction of the matter. We do not think the courts are to be downgraded in this way. The cases cited by Petitioners in this connection, *Newport News Shipbuilding Co. v. Schauffler* (1938) 303 U.S. 54, 82 L.Ed. 646 and *Meyers v. Bethlehem Ship Building Corp.* (1938) 303 U.S. 41, 82 L.Ed. 638, are distinguishable. They involved situations where proceedings had been brought before the NLRB by labor unions and the employers then went into federal district court to enjoin the Board from acting, on the claim that interstate commerce was not affected. This Court held that the employers had to exhaust their administrative remedies, asserting their claims before the Board and appealing if the ruling were adverse. That is certainly far different from a claim that an employer cannot proceed in a state court because the defendant union challenges the court's jurisdiction on a claim that exclusive jurisdiction lies with the Board—though that jurisdiction has been invoked by no one.

This court recently denied certiorari (28 Law Week 3118) in the case of *Retail Clerks Union v. California Superior Court*, 44 LRRM 2161. It thereby permitted to stand a decision by the California Supreme Court holding (1) that a state court can determine the facts necessary to a decision as to its jurisdiction in the face of a claim of exclusive jurisdiction in the NLRB, and (2) that more is required to establish such federal jurisdiction than mere allegations that interstate commerce is affected.

[3] At pages 24-27 of their Brief, Petitioners argue that the Board has exclusive jurisdiction to pass on the lawfulness of peaceful strikes and picketing "in all industries affecting commerce." This contention is unsound for two reasons: first, because it mis-states the statute by suggesting that the jurisdictional test is whether the "industry" concerned affects commerce when the critical issue is whether the unfair labor practice involved does so (see *infra*, pp. 49, 55-56), and second, because it *assumes* that which must be proved, namely that commerce *is* affected.

B. The Strike and Picketing Here Involved Do Not Affect Interstate Commerce

(1) The derivation of gross annual revenues of $1,436.55 from "Linkage" services to interstate passengers by 118 separate taxicab companies is de minimis and does not confer exclusive jurisdiction on the National Labor Relations Board

None of the Respondent's business activities is "in commerce" or directly involves interstate movements of persons or commodities. Even if jurisdiction over the present dispute is to be determined by reference to the aggregate operations of the 118 separate taxicab companies,[4] only a very insignificant part of their

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None of the seven cases cited at page 25 of the Brief are relevant here because they all clearly involved conduct affecting, or tending to affect, interstate commerce, and which was either proscribed by the federal act or protected because directed toward legitimate ends. Neither of these is true in this case.

[4] As is indicated in the Statement of the Case, the Court below accepted the union's "hypothesis" that Respondent and the 118 operating companies constitute a system which can be treated as an entity, but expressly did not so decide (R. 67). In Note 4 at page 26 of their Brief, Petitioners cite eight NLRB cases as supporting the trial court's ruling that the revenues of Respondent and the 118 taxicab companies can be lumped together for purposes of trying to establish jurisdiction in the Board. We believe all of these cases are distinguishable on one or more of the following grounds: (1) Several involve no lumping of revenues, and in fact no question as to the Board's jurisdiction at all; (2) in others all parties agreed that the different companies involved constituted a single employer; (3) in some there was substantial identity of stockholders, officers and directors among the companies; (4) in some there was substantial control of the operations, and particularly the personnel policies, of a number of corporations by one dominant corporation, and (5) in some there had been an extensive record of joint labor negotiations. Petitioners insist that Mr. Wenck, Respondent's president, still dominates and runs a single taxicab company having 120 cabs just as he did when he was resident partner of the Yellow Cab Company prior to the liquidation of that firm in 1956. They ignore all the legal instruments which have been executed in carrying out that liquidation and all the money the owner-drivers have paid in that connection. They ignore the day-to-day control of cab operations by the owner-drivers and their

business falls into this category. It is agreed that the operating companies enjoy the exclusive right to transfer through-passengers and their baggage between the railroad terminals and the Canadian Pacific Steamship Dock, and that they derived aggregate gross revenues from this business of $1,436.55 during the year July 1, 1957, to June 30, 1958. This amounts to a mere 1/10 of 1% of their total gross revenues for that year and to only $12.17 per year per company. We submit that this is *de minimis* and cannot provide the basis for a claim that the state courts are ousted of all jurisdiction in this case.

In *National Labor Relations Board v. Fainblatt* (1939) 306 U.S. 601, 83 L.Ed. 1014, question was raised as to the application of the National Labor Relations Act to an employer who contended that the volume of commerce involved (the shipment of thousands of finished garments per month across state lines) was too small to come within the jurisdiction of the NLRB. The Court stated, at page 607:

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce

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designated representatives. They can see only one entity for labor purposes although the corporate, taxing, licensing and other agencies of the City of Seattle and the State of Washington have no difficulty recognizing 119 separate entities. We believe that a reading of the record will demonstrate that this multiple view of things is correct and that Petitioners' conception of the situation in one formed by a desire to return to conditions as they once were, but are no more. In this connection, see *State v. Northwest Magnesite Co.* (1947) 28 Wn.(2d) 1, 182 P.(2d) 643.

affected *more than that to which courts would apply the maxim de minimis.*" (Emphasis supplied)

It is clear, therefore, that there *are* cases in which the commerce involved is too insignificant to justify the exertion of federal power—and that the doctrine "*de minimis non curat lex*" applies in the field of federal regulation of labor relations.

We submit that this is such a case, for if not it would be hard to imagine a case in which this salutary rule would be applied. In *Friedberg v. Pennsylvania Labor Relations Board*, 395 Pa. 294 (Advance Sheets), 148 A.(2d) 909, the Supreme Court of Pennsylvania held that the National Labor Relations Board did not have jurisdiction, thus permitting the Pennsylvania Board to handle the case. The employer there involved operated a window cleaning service doing a gross annual business of some $40,000. Of this, $12,162 was business done for twenty-five firms engaged in interstate commerce, including railroads, truck lines, and manufacturers of products shipped in commerce. The Pennsylvania Supreme Court held this to be *de minimis*, remarking that the business of the employer was so trivial that if the doctrine did not apply there, it had no meaning. Appeal was taken to this Court and the *de minimis* issue clearly raised. This Court, in a *per curiam* opinion, recently dismissed the appeal and, treating the papers on which the appeal was taken as a petition for writ of certiorari, denied certiorari. 28 Law Week 3107. Since both the dollar amount involved and the percentage of the total business were larger there

than in the instant case, we submit that a like ruling should be made here.

Petitioners cite only one case (page 33 of their brief) on the issue of whether this "linkage" revenue is *de minimis*, and that is *NLRB v. Suburban Lumber Co.* (CCA3-1941) 121 F.(2d) 829. The court there did state, as indicated, that *de minimis* has always been taken to mean matters of a few dollars or less. However, the actual holding of the case was that annual purchases of lumber amounting to $150,000, most of it coming from other states, could not be considered in the category of *de minimis*. Certainly the sum here involved is so much more trifling that the *Suburban* case is clearly to be distinguished.

The *amicus* brief of counsel for the National Labor Relations Board, at page 14, cites the additional case of *International Brotherhood of Electrical Workers v. National Labor Relations Board* (CA2-1950) 181 F.(2d) 34, affirmed, 341 U.S. 694, 95 L.Ed. 1299. As is there pointed out by counsel, the Court of Appeals held that the Board had jurisdiction of a secondary boycott against a non-union New York contractor whose work on the construction of a house in Connecticut was valued at only $325. However, it is apparent from a reading of the full opinion that the court did not hold that pecuniary sum sufficient to establish jurisdiction in the Board. It considered the contractor's over-all operations and pointed out that he actually had to cross state lines to perform the work, that he had to transport materials across the line to the job, and that his "general business required him con-

tinuously to import *substantial amounts* of material from other states into New York, and he did a *substantial amount of work* in Connecticut *in addition to the job in question*, as well as work for large contractors *whose own interstate activities were very large indeed.*" (Emphasis supplied) It is also noted that the general contractor's headquarters was likewise in New York, that he, too, had to travel into Connecticut and bring in materials for the job, and that his business also "extended into other states in substantial amounts." It is therefore clear that jurisdiction turned on much more than a single $325 job, and that the case is not authority against our contention that the sum here in question is *de minimis*.

Authority on this point, and in support of our position, is to be found in the very NLRB press release relied on so heavily by Petitioners as establishing that the Board would take jurisdiction of this case. Both Petitioners and the Board set forth what they regard as applicable portions of the Board's Press Release No. 576, dated October 2, 1958 (Petitioner's Brief, pp. 47-48; the Board's Brief, p. 18). Of the ten categories for which new standards for the exercise of the Board's jurisdiction were announced, two are set out in each case. One involves a straight gross volume standard which is discussed below. The other, which is relevant here, reads as follows:

> "4. *Instrumentalities, links and channels of Interstate Commerce:* $50,000 from interstate (or linkage) part of enterprise, or from services performed for employers in commerce."

Obviously the only possible applicability of this provision to this case would be in connection with the $1,436.55 of direct "linkage" revenues realized by the 118 operating companies from the transfer of through-passengers between the railway terminals and the Canadian Pacific Dock.[5] This is clearly far less than the minimum set by the Board itself with regard to such revenues. The Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Congress, 1st Session, Section 701 (*infra*, p. 69) expressly authorizes the Board thus to set the limits below which it will decline to exercise jurisdiction and provides, correlatively, that the courts of the States can exercise jurisdiction over labor disputes which the Board declines to accept. This would seem clearly to establish that even when the "linkage" revenues of the 118 taxicab companies are combined they represent such an inconsequential sum that both the Board and the Congress have recognized it as *de minimis* and, there-

[5] Petitioners (Brief, pp. 35-37) and counsel for the Board (Brief, pp. 13, 18) seek to ignore the distinction between this business and the more extensive business of simply hauling passengers to and from rail, air and steamship terminals, and attempt to meet this "linkage" jurisdictional standard of the Board by lumping the revenues from both classes of business together. This is clearly improper. *United States v. Yellow Cab Co.* (1947) 332 U.S. 218, 91 L.Ed. 2010, relied upon by the court below and cited in the briefs of Petitioners and of counsel for the Board, clearly holds that the transfer of through-passengers between terminals is "in commerce" but that general taxicab service to interstate terminals is *not* "in commerce." Since the $50,000 jurisdictional standard here in question relates to "instrumentalities, links, and channels of interstate commerce," it is clear that it refers only to the former category and does not include revenues from services which are merely local adjuncts to interstate commerce. This latter activity is not "in commerce" and at most can be claimed to affect commerce. Neither *Red Cab, Inc.* (1950) 92 NLRB 175, nor *Garner v. Teamsters Local Union No. 776* (1953) 346 U.S. 485, 98 L.Ed. 228, cited by Petitioners on this point in any way impairs the authority of the *Yellow Cab* case, *supra*, on this issue.

fore properly to be left to the jurisdiction of the state courts.[6]

(2) The activities of the union complained of here have not affected commerce and therefore do not come within the jurisdiction of the National Labor Relations Board

There is still a further basis for the holding of the court below that the National Labor Relations Board does not have exclusive jurisdiction of the union conduct here in question, namely, that said conduct has not affected interstate commerce in any way. The Court said (R. 67):

> "If it be conceded that one-tenth of one per cent of its total operations is in interstate commerce, we do not believe that Seattle's Yellow Cab system constitutes such an integral step in the interstate

[6] Petitioners (Brief, p. 30) and counsel for the Board (Brief, p. 19) contend that this action of Congress "froze" the jurisdictional standards of the Board as of August 1, 1959, or incorporated them into the Act—and that this indicates Congressional approval of the Board's determination that "taxicab companies of this size are obviously engaged in an industry 'affecting commerce'." We would point out again that jurisdiction depends not on whether an industry affects commerce but whether an unfair labor practice does so; and if this is all so "obvious," it could, and should, have been proved. Furthermore, it is clear that Congress neither intended to, nor could constitutionally, extend the Board's jurisdiction beyond its previous scope, which already comprehended the federal government's full power over commerce. The fact remains that it is effect on commerce, not mere size of the business, which determines the Board's jurisdiction. See Note 7, below. In this provision, Congress was approving the Board's restriction of its jurisdiction—and, as a concomitant, recognizing the power of the States to act with respect to the areas thus relinquished—and was not in any sense acting to extend the reach of the Board's power. There is nothing to indicate approval of specific Board standards, but merely that its delimitation of its authority should not be carried beyond the standards, whatever they might be, as of the date indicated. We do not see how this can be tortured into confirmation of a standard announced by the Board unless that standard was already a valid one.

> movement of passenger traffic as to be considered as being in interstate commerce, *nor* that any unfair labor practices whether by the union or the Yellow Cab system burden or obstruct interstate commerce." (Emphasis supplied)

This is a clear holding (1) that the revenues from the transfer of through-passengers are *de minimis* and (2) that the derivation of more substantial revenues from the movement of passengers to and from the airports, railway terminals and docks (R. 61-62) does not create jurisdiction in the Board because no burden or obstruction to commerce was shown to have been caused by the strike and picketing.

The statutory provision conferring jurisdiction on the Board with respect to labor disputes (as distinguished from representation elections) is Section 10(a) (29 U.S.C. Sec. 160 (a)) reading as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

It is therefore clear that its jurisdiction extends only to conduct "affecting commerce," and that phrase is defined in Section 2(7) (29 U.S.C. Sec. 152(7)) as follows:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The term "commerce" is defined, in turn, in Section 2(6) (29 U.S.C. Sec. 152(6)):

> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several states * * *."

Since Respondent's activities are not "in commerce" and since the revenues even of the 118 operating companies from activities in that category are *de minimis*, it is clear that any claim of jurisdiction in the Board must depend on a showing that commerce has been affected by conduct burdening or obstructing it. *There has been no such proof offered in this case.*

The court below said as to this (R. 66):

> "There is no testimony in the record that this strike has impaired taxicab service to or from the railroad terminals, airports, and docks, and hence no evidence of any effect upon interstate commerce sufficient to justify the application of the National Labor Relations Act. *United States v. Yellow Cab Co., supra.* No such circumstance is present in this case."

Petitioners concede this at page 39 of their brief, where they say:

> "In holding that the Seattle Yellow Cab system was not subject to the jurisdiction of the National Labor Relations Board, the court below was influenced by *the fact* that there was *no evidence in the record* indicating that the strike and picketing of petitioner Local 465 had interfered with the transportation of passengers to and from the railroad, airline and steamship terminals and *thus no evidence that commerce was actually burdened or obstructed* (R. 66)." (Emphasis supplied)

Petitioners noted certain statements of Respondent's

president, but none of these referred to impact on cab service to and from the terminals serving interstate carriers. Petitioners have therefore sought to correct this deficiency by making strong assertions that the Board would assume jurisdiction over this dispute under its current jurisdictional standards,[7] by indulg-

[7] See pages 28-30 and 47-55 of Petitioners' Brief, as well as pages 17-18 of the brief of counsel for the Board. The "linkage" standard of $50,000 has already been discussed. The other standard quoted in both briefs is that whereby, through a footnote in category 6, "Transit Systems," the Board's press release of October 2, 1958 indicated that it would take jurisdiction of taxicab companies satisfying the "retail test," which simply requires an annual gross business of $500,000. We do not suppose it will be contended that the Board, by the mere incantation of large figures, can extend its jurisdiction one iota beyond that specified by Congress. As indicated above, the standard set by Congress depends upon the occurrence of an unfair labor practice which affects commerce. It follows, therefore, that if a taxicab company does ten times $500,000 worth of business a year but the unfair labor practice complained of does not affect commerce, then the Board has no jurisdiction. (See the opinion of the court below, R. 63) Whatever may be the validity of assuming that a retail store doing $500,000 worth of business a year must buy substantial quantities of merchandise originating in other states and which would not be required if the store were shut down by a strike, no basis appears, or is suggested, for concluding that 118 driver-owned cab companies doing a similar gross business could not be involved in a labor dispute without any effect on interstate commerce. In any event, all such presumptions or assumptions become worthless when, as here, a dispute leads to a strike and picketing which cannot be shown to have had any adverse effect on interstate passenger travel.

Cab Services, Inc. (1959) 123 NLRB No. 19, cited in both briefs, is distinguishable despite certain surface similarities to this case. In the first place, all parties there agreed that the service agency and the operating entities were closely integrated and that they constituted a single employer—and that is not true here. Secondly, no challenge to the jurisdiction of the Board was made on the grounds of lack of effect on commerce urged here, the central issues in that case being whether an existing contract with one union was a bar to another union's petition for an election and whether owner-drivers were to be excluded from the bargaining unit. Passing reference to taxicab companies not being interstate commerce was made in the brief of counsel for the union asserting the bar, but solely to excuse the union's reliance on state, rather than federal, law concerning permissible union security arrangements. Finally, there was at least some evidence introduced in that case to estab-

ing in inferences and speculations not based on the record," and by the insertion of purported facts in footnotes. But at the same time they have argued—as have counsel for the Board—that no such evidence was necessary in the first place.

lish that the employer purchased substantial amounts of gas and oil from sources which obtained it in other states.

It is also noteworthy that Petitioners' (Brief, pp. 35-36) and counsel for the Board (Brief, p. 17, N. 5) have both set forth the extremely spotty record of the Board in dealing with taxicab operations. It should be recalled that while the standards announced in *Cambridge Taxi Co.* (1952) 101 NLRB 1328 (discussed in the Board's Brief) were in effect, the Board refused jurisdiction of a company with annual revenues of $2,500,000, of which 20% was derived from serving three railroad stations in Boston. *Checker Taxi Co.* (1953) 107 NLRB No. 85. This was not due to any lack of funds, but simply because the Board did not feel that commerce was affected even by such a large operation so substantially related to interstate terminals—more substantial in both respects than in this case. Thereafter, the Board reverted to its old position that cab companies were essentially local in their operations, stating that "to assert jurisdiction over such enterprises would neither comport with the Congressional intent that the Board refrain from extending its activities to matters of local significance, nor otherwise effectuate the policies of the Act." *Checker Cab Co.* (1954) 110 NLRB 683. There has certainly been no change in the character of the cab business which affects the soundness of that conclusion.

[8] Similarly, deficiencies of proof cannot be supplied by talking about what could have been proved—though this would sometimes make the practice of law much easier. Petitioners (Brief, pp. 30, 39) and counsel for the Board (Brief, p. 15, N. 3) argue that a taxicab company doing a half million dollar yearly business "would undoubtedly make substantial direct or indirect out-of-state purchases" of cabs, parts, and gasoline; that it "cannot be disputed" that the 118 operating Yellow Cab companies make such purchases; and that taxicab systems "often purchase" items which come from out-of-state sources. There are two answers to all of these gentle "suggestions": First, that there is no evidence in the record to sustain them; and second, that even if it were conceded that such purchases are made there is neither evidence nor conjecture to indicate to what extent, if any, they have been influenced in such fashion as to affect commerce. The cabs are still operating, burning gas and oil, wearing out tires, and reaching such condition as to require replacement. There is the same fatal failure of proof as to this claim of impact on interstate movement of supplies as exists with respect to the speculative claims that passenger traffic has been affected.

In support of this proposition Petitioners cite *NLRB v. Bradford Dyeing Association* (1940) 310 U.S. 318, 326, 84 L.Ed. 1226; *NLRB v. Phoenix Mutual Life Insurance Co.* (CCA7-1948) 167 F.(2d) 983, 985, cert. denied, 335 U.S. 845, 93 L.Ed. 395; *NLRB v. Alloy Cast Steel Co.* (CCA6-1941) 117 F.(2d) 302, 303; and *NLRB v. American Potash & Chemical Corp.* (CCA9-1938) 98 F.(2d) 488, 495, cert. denied 306 U.S. 643, 83 L.Ed. 1043. These cases are all distinguished on the ground that in none of them had the labor dispute in question led to a strike or picketing which would permit an actual testing of the ultimate possible impact on interstate commerce which justifies federal regulation. The cases stress that the objective of the National Labor Relations Act is preventive and remedial, its purpose being to forestall labor strife that may affect commerce. We concede this and recognize that when claims of unfair labor practice are litigated before such practices have resulted in a strike, the jurisdiction of the National Labor Relations Board is necessarily to be tested on evidence as to the employer's direct involvement in commerce or his purchase or sale of substantial quantities of raw materials or finished products in such commerce, together with reasonable inferences as to the effect that a work stoppage would have upon commerce or the flow of goods in commerce. It is for this reason that the statutory definition of "affecting commerce" quoted above includes the phrase "or . . . tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Counsel for the Board cite two additional cases,

Virginian Railway Co. v. System Federation No. 40 (1937) 300 U.S. 515, 557, 81 L.Ed. 789 (involving the Railway Labor Act) and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948) 334 U.S. 219, 236, 92 L.Ed. 1328 (involving the antitrust laws). These cases, likewise, merely recognize the preventive regulatory power of Congress to anticipate evils or to deal with individual cases of conduct which, in the aggregate, will have consequences within its powers, but say nothing to indicate that it is not essential to show real and present impact on commerce where the evils have actually occurred.[9]

But the definition of "affecting commerce" also contemplates the situation where a strike *has* resulted, as here, and in such a case inference and projection have no place. With respect to such a situation the definition reads that "The term 'affecting commerce' means . . . having led . . . to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. Sec. 152(7). Where the effect on commerce giving jurisdiction to the Board is claimed to arise from a present labor dispute which has eventuated in a total work stoppage and picketing—certainly the ultimate in possible impact on commerce—the test can no longer be speculative or conjectural, inquiring as to what "might" happen. *It has already happened!* Its

[9]Counsel suggest (Board Brief, p. 20) that the absence of a showing of actual disruption of service to and from the terminals merely "suggests" that substitute facilities "may have been" brought into play—and that that factor is immaterial for purposes of determining whether commerce has been affected. Again, this is speculation. If service was maintained only because other facilities were brought into play, that should have been proved—but it was not.

effects should be observable, and as a consequence, one asserting that the required effect on commerce exists must offer proof to that end. That is the situation here, where the strike and the concomitant picketing were in their twenty-fourth day when the trial closed. Yet Petitioners offered no proof whatsoever as to what the effects on commerce *had been*, and even now talk solely in terms of the future — what "would," or "could," or "might" be the consequences. Why guess when the facts were available? Failure to offer proof that commerce had been burdened suggests that no such proof was offered because none existed!

Difficulty with this point colors Petitioners' entire brief. They argue that "The Seattle Yellow Cab system is engaged in an industry affecting commerce" (Brief, p. 27) and that its general business "activities" affect commerce (Brief, p. 32). However, the statutory authority of the National Labor Relations Board is not stated in terms of the "industry" concerned or the business "activities" of the particular employer but is clearly confined to "any *unfair labor practice* (listed in section 8) affecting commerce." (Sec. 10(a)—emphasis supplied) See *NLRB v. Denver Building & Construction Trades Council* (1951) 341 U.S. 675, 683, 95 L.Ed. 1284 ("The *activities complained of* must affect interstate commerce"), and *Polish National Alliance v. National Labor Relations Board* (1944) 322 U.S. 643, 647, 88 L.Ed. 1509 (Congress has undertaken regulation of this field "to protect interstate commerce from adverse effects of *labor disputes*"). Also see *Con-*

solidated Edison Co. v. National Labor Relations Board (1938) 305 U.S. 197, 222, 83 L.Ed. 126.

Similarly, Petitioners and counsel for the Board repeatedly state that a labor dispute involving Yellow cabs "could" obstruct commerce (Pet. Brief, p. 23) or "could" logically or easily burden commerce (Pet. Brief, pp. 32, 37[10]); that a strike involving the cabs "might" interrupt or curtail the transfer of through passengers (Pet. Brief, p. 33); that any interruption in servicing incoming passengers at the rail, air, and steamship terminals "would" directly obstruct commerce (Pet. Brief, p. 35); that curtailment of taxicab service "would" necessarily tend to cast a burden on interstate travel (Board Brief, p. 14); that the impact of a strike involving the cab system on interstate commerce "would" perhaps be even more direct than in

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[10]At this point in Petitioners' Brief, and at page 15 of the brief of counsel for the Board, the case of *New York State Labor Board v. Wags Transportation System, Inc.* (1954) 130 N.Y.S.(2d) 731, aff'd 2[illegible] App. Div. 883, 134 N.Y.S.(2d) 603, is cited, with Petitioners placing a good deal of emphasis upon it. The case is clearly distinguishable, first because of the much greater volume of taxicab traffic incidental to the rail, ferry, steamship and air terminals of New York City. The court in that case was, therefore, dealing with literally millions of passengers in the direct flow of international and interstate travel, and as a consequence was careful to point out the extraordinary impact which a taxicab strike in New York City—and particularly one involving the Terminal System of which Wags was a part—would have upon such passenger traffic in interstate and foreign commerce. More specifically, the *Wags* case can be distinguished upon the grounds (1) that no strike had occurred there, so that the court was required to speculate on the probable effects on commerce of such an occurrence, and (2) that the cabs there involved were not driver-owned but were operated entirely by employed drivers, so that a work stoppage would probably have had serious impact on service to interstate travelers. Here, however, the strike occurred but the cabs are still operated by their owner-drivers. There is no room for speculation, and the absence of proof of any effect on commerce is proof that there was none.

the case of a local transit company (Board Brief, p. 16); and that the test is "the potential threat to interstate commerce in the event of a work stoppage" (Board Brief, p. 22). All these passages speak as if the strike here in question had never occurred. If all these consequences giving rise to jurisdiction in the Board "could," "might," or "would" occur, then there must have been some observable evidence of such effects on commerce during the twenty-four days which elapsed between the beginning of the strike and the conclusion of the proceedings in the trial court. There should have been witnesses who had seen or experienced these things and could testify to these effects. However, the record is clear that Petitioners did not put on a single witness to show that there had been any interruption in the services provided by the Yellow Cab companies to and from the air, rail and steamship terminals. In fact, it clearly appears that the only place where pickets were stationed was at Respondent's garage, far away from any of the terminals servicing interstate passengers. It must therefore be concluded that the consequences about which so much speculation is indulged in did not in fact occur and that all talk about the supposed burdens on commerce which "could" result from a taxicab strike are specious and completely invalid.

Much of this confusion perhaps results from failure to take in account the fundamental change which took place upon the dissolution of the old Yellow Cab Company in 1956. Prior to that time a strike might well have had impact upon the cab service available to interstate travelers. Now, however, since most of the 118

operating companies are driver-owned, a strike no longer has such results. The owners have continued to drive their cabs (R. 128, 214-215, 228-229) and service to the interstate terminals has been maintained and the commerce here in question – the interstate movement of travelers—has *not* been affected.

It should be noted, of course, that the failure of Petitioners to prove any impact on commerce applies equally to the transfer of through-passengers between the railroad terminals and the steamship docks. In other words, it must be assumed, on the record, that this through traffic was not in any way burdened or obstructed.

The underlying factor making speculation as to "possible" consequences of the strike utterly inappropriate here is that no temporary restraining order against picketing was ever obtained. In cases where such interim relief has been given it may still be necessary to draw inferences as to the "probable" impact of the strike upon commerce because no actual experience with picketing is available. But in this case Petitioners have at all times been free to picket as they wish, they in fact did so for twenty-four days, and yet they were able to produce no evidence that this labor dispute has affected Respondent's local activities in such a way as to burden or obstruct the free flow of interstate commerce.

In other words, since the jurisdiction of the National Labor Relations Board is limited to dealing with unfair labor practices affecting commerce, it is obvious that

when the practices concerned have resulted in a strike and picketing which have continued without judicial restraint for a reasonable time without observable effect on interstate commerce, the Board has no jurisdiction. It then follows that the courts of the States are empowered to accept jurisdiction of the matter. If in a case such as this one actual proof of impact on commerce is not to be required, the effort to draw a line between federal and state power over commerce might as well be abandoned because some theoretical or possible effect on commerce can be postulated in nearly every case.[11] If proper respect for state jurisdiction is to be preserved and our federal system of government maintained, a claim that commerce has been affected should require proof like any other jurisdictional fact. Such proof is entirely lacking here.

CONCLUSION

We submit, for the reasons stated above, that the court below did not err in ordering the trial court to take jurisdiction of this case and in rejecting, thereby, Petitioners' contention that the National Labor Relations Board has exclusive jurisdiction of this proceeding. Counsel for the Board, at page 19 of their brief, set forth what they conceive to be the three

[11] Let us consider an extreme case, employing two arguments advanced by Petitioners, namely, (1) that interruption of out-of-state purchases of raw materials, gasoline, parts, etc., as a result of a labor dispute constitutes a burden on commerce, and (2) that anything over a few dollars is not *de minimis*. Assume there is a potter who runs a small kiln, fashioning products out of local clays which he sells entirely within the State of Washington. He owns a truck which he uses in the business and employs a man to drive it. He buys, locally, gasoline for the truck, tires and parts for it as needed, and paints for use in the pottery he

principal grounds for the decision below. We think these can be restated, more accurately, as follows:

(1) Respondent and the 118 operating taxicab companies are not engaged "in commerce" because only $1,436.55 of their combined revenues comes from business of that character, and said amount is *de minimis* and does not confer exclusive jurisdiction on the Board. *United States v. Yellow Cab Co.*, 332 U.S. 218.

(2) Both as to this "linkage" revenue *and* as to the larger sums derived from the carriage of passengers to and from railroad terminals, airports and docks, there was no showing that the labor dispute has impaired taxicab service at such terminals. This constitutes a failure of proof as to the claim that the conduct in question affects commerce, which is essential to Petitioners' challenge to the jurisdiction of the state courts.

We think this is a fair statement of the essential holding of the Supreme Court of the State of Washington, and that in so ruling the Court reached the proper result under the decisions of this Court as applied to the specific facts of this case.

Finally, we repeat that a grave constitutional question has now been raised. If this Court proclaims the exclusive jurisdiction of the federal government in a

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produces—all of which were produced outside the state—at a total cost of $1,500 per year. A union representing craftsmen working in large nearby potteries demands that he employ a member of the union and observe union hours of work. He refuses, the union pickets peacefully, and the truckdriver honors the picket line. Since the man must now both make the pottery and drive the truck, his imports of materials are cut in half. Since this would involve more than a few dollars, Petitioners would apparently argue that if he wished relief against the picketing, he would have to invoke the jurisdiction of the NLRB.

case of this kind because of a minute percentage of interstate-linked carrying of passengers, then it would appear that it is indeed basing its decision on the weakest conceivable link theory affecting the current of commerce.

Would it not then be approving a doctrine of the omnipotence of the nation state, in which all rights of individuals, communities, municipalites, states and, may we say, international bodies, spin off and are derived from a single and complete national authority?

What would such a decision do to the concept of a federal union in which heretofore the forbidden ground for the federal government is the residuum of sovereignty in the states, in spite of all the changing complexities of modern life?

If this court, out of concern for complete uniformity in the regulation of labor relations, overrules the lower court in this case, it may destroy the always delicate system of checks and balances so crucial to the functioning of our federal form of government. We hope that such a magnification of federal power at the expense of the rights of the states and the individual, which would surely pose a problem for strict and liberal constructionists alike, may be avoided.

Wherefore, Respondent respectfully prays that the judgment of the court below be affirmed.

Respectfully submitted,

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Of Counsel:
WARREN R. SLEMMONS
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APPENDIX A

Pertinent sections of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. Secs. 141-187, are as follows:

Short Title and Declaration of Policy

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all, recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to

protect the rights of the public in connection with labor disputes affecting commerce.

* * * *

Findings and Policies

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions

Sec. 2. When used in this Act—

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the

execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

* * *

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such case by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

Limitations

Sec. 13. Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

APPENDIX B

Pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, are as follows:

Sec. 701 (a) Section 14 of the National Labor Relations Act, as amended, is amended by adding at the end thereof the following new subsection:

"(c)(1) The board, in its discretion, may, by rule of decision or by publisned rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Boafd shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(c)(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

* * *

SUPREME COURT OF THE UNITED STATES

SUPERIOR COURT OF STATE OF WASHINGTON FOR KING COUNTY ET AL. *v.* STATE OF WASHINGTON ON THE RELATION OF YELLOW CAB SERVICE, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 76. Decided January 25, 1960.

PER CURIAM.

The judgment is reversed. *San Diego Building Trades Council et al. v. Garmon et al.*, 359 U. S. 236.